IN THE

Supreme Court of the United States

OCTOBER TERM, 1944

SIMON METRIK,

Petitioner,

—against—

FORT TRYON GARDENS, INC.,

Respondent.

BRIEF IN SUPPORT OF PETITION

Opinions Below

No opinion was rendered by the Municipal Court, the Appellate Term of the Supreme Court or the Appellate Division of the Supreme Court.

Jurisdiction

The determination of the Appellate Term, First Department, of the Supreme Court of the State of New York, now sought to be reviewed was rendered on June 14th, 1944 (R. 58-59); the Appellate Division denied petitioner's motion for a further appeal on October 13th, 1944 (R. 79-80); and the time to apply for certiorari was extended by Mr. Justice Jackson to and including March 1st, 1945 (R. 80).

The jurisdiction of the Supreme Court of the United States is invoked under Section 237 of the Judicial Code as amended, otherwise known as 28 U. S. C., Section 344, Subdivision b.

Statutes Involved

The subject sections of the Civil Practice Act of the State of New York are as follows:

> "Section 1419. PRECEPT; RETURN. The precept must be returnable not less than five nor more than ten days after it is issued; except that, where the proceeding is taken upon the ground that a tenant continues in possession of demised premises after the expiration of his term without the permission of his landlord and the application is made on the day of the expiration of the lease or on the next day thereafter, the precept may, in the discretion of the judge or justice, be made returnable on the day on which it is issued at any time after twelve o'clock noon and before six o'clock in the afternoon." (L. 1921, ch. 199.)

> "Section 1421 (in part). PRECEPT; HOW SERVED. * * * If the precept is returnable on the day on which it is issued, it must be served at least two hours before the hour at which it is returnable." (L. 1921, ch. 199.)

Statement of the Case

A summary statement of the case and of the argument is set forth in the petition.

Specification of Error to Be Urged

The error to be urged is identical with the reason for the allowance of writ set forth in the foregoing petition.

ARGUMENT

New York Civil Practice Act, Sections 1419 and 1421, to the extent that they permit the issuance of a final order and an eviction in summary proceedings upon two hours' notice, should be held unconstitutional as sanctioning the deprivation of property upon insufficient notice and therefore without due process of law.

As has been pointed out in the petition, this constitutional question was raised by petitioner at the outset and has been consistently preserved throughout the course of the litigation. From his initial motion to vacate the final order (R. 11) through his application to the Appellate Division (R. 68), as well as at every intermediate stage, petitioner has protested the invalidity of the proceeding on the ground that the statutory provisions for two-hour notice contravened the first subdivision of Amendment XIV to the Constitution of the United States.

The two sections of the Civil Practice Act whose constitutionality petitioner has challenged purport to regulate in part the procedure in summary proceedings for the recovery of real property. Section 1419 declares in substance that where the ground of the summary proceeding is that the tenant is a holdover after the expiration of his term, the precept may in the judge's discretion be made returnable on the afternoon of the day of issuance. Section 1421, so far as material, enacts that in such cases the precept must be served at least two hours before the hour at which it is returnable.

The question before the Court is whether two hours constitute a reasonable time within which a litigant or his counsel may appear before the tribunal issuing the precept and assert such defense as may be available to the proceeding. At the outset it must be remembered that a precept in summary proceedings need not be served personally upon the person to whom it is directed (generally the tenant). If the person be absent from his dwelling-house, it may be served by delivering a copy "to a person of suitable age and discretion who resides there," or, if this is not reasonably convenient "to any person of suitable age and discretion employed there"; or, indeed, if neither of these methods is feasible, by affixing one copy to a conspicuous part of the property and by mailing another to the person to whom it is directed. The statute expressly so provides (Civil Practice Act, Section 1421, subdivisions 2 and 3).

Certainly if service is accomplished in one of the foregoing fashions and the precept is returnable in two hours, defaults on the part of the tenants must be the rule rather than the exception. Although the tenant is fortunate enough to be at home when the process is served, we submit that within the space of two hours it is not ordinarily possible to communicate with a lawyer, make an appointment to meet him, retain him, confer with him, have him prepare an answer and have him attend in court at the appointed hour. Even in a great city, where lawyers are reputed to be plentiful and the means of communication and travel are alike excellent, it is extremely doubtful whether the average litigant could move with sufficient despatch to safeguard his rights in such a situation.

What then are we to think of the plight of petitioner herein, himself a lawyer? The papers are served at his home a few minutes after ten in the morning (or so the landlord says). Petitioner has already left and is on his way to a court engagement in a neighboring county. His

wife, taking care of two little children along with her other household duties, is unable to reach him by telephone despite efforts directed to that end. But the papers are returnable in the Municipal Court at 12:05 P. M. It may be remarked that respondent invoked the two-hour method on an affidavit that it was obliged to deliver possession of the premises to another tenant that very day (R. 6-7), when as a matter of fact three days later there was still no sign of the new tenant on the premises (R. 12). Respondent proceeded post-haste to obtain its final order by default at 12:05 P. M., and the same afternoon a marshal appeared on the scene, evicted petitioner's wife and children and placed his household effects on the sidewalk. And still petitioner was not aware that a summary proceeding had been instituted against him. The tenor of the New York statutes is such as to render proceedings of which the foregoing is a fair sample, perfectly legal and permissible.

The terms of the Fourteenth Amendment, however, stand as an effective bar to the validity of any such high-handed methods. Due process has as one of its prime requisites the giving of reasonable notice to any defendant or party whose rights are sought to be affected. One of the leading cases on this subject is *Roller* v. *Holley*, 176 U. S. 398, 44 L. Ed. 520. There this Court had under consideration the validity of a Texas statute providing for five days' notice to a non-resident in a suit to foreclose a lien on realty. The process was served in Virginia six days before the return date (January 8th, 1891), although under provision of the law the case could not have been called for trial on default until January 9th, when the default was actually taken and judgment was entered. It appeared that in those days it required four days of traveling to reach the court from the point where service was effected. This Court held that under the circumstances of that case the notice given was insufficient to constitute due process of law. With respect

to the argument that the default might have been opened, the Court wrote (by Mr. Justice Brown):

> "Very probably, too, the court which rendered the judgment would have set the same aside, and permitted him to come in and defend; but that would be a matter of discretion—a contingency he was not bound to contemplate. The right of a citizen to due process of law must rest upon a basis more substantial than favor or discretion."

That excerpt applies with almost prophetic force to the situation of the present petitioner, who, despite his striving, has to this day not yet succeeded in having his so-called default opened. He adduced a perfect excuse (his absolute ignorance of the pendency of the proceedings), he moved with unexampled diligence (obtaining an order to show cause on the very day when the summary proceeding was commenced—and concluded) and he showed a meritorious defense (a renewal of the tenancy). Yet he found himself as effectively out of court as out of the premises from which he had been so precipitately evicted.

In the same case Mr. Justice Brown quoted with approval the rules expressed in 2 Chitty's General Practice 175 regarding summary proceedings:

> "The time appointed must always allow sufficient opportunity, between the service of the summons and the time of appearance, to enable the party to prepare his defense and for his journey; and the justice should in this respect take care to avoid any supposition of improper hurry, or he may incur the censure of King's Bench, if not be subject to a criminal information. The precise time will generally depend on distance, and the other circumstances of each particular case. With analogy to other branches of the law, a man should

> not be required, *omissis omnibus aliis negotiis,* instantly to answer a charge of a supposed offense necessarily less than an indictable misdemeanor, on the same or even the next day, and should be allowed not only ample time to obtain legal advice and assistance, but also to collect his evidence; and even the convenience of witnesses should be considered; and therefore, in general, several days should intervene between the time of summons and hearing. In the superior courts in general, at least eight days' notice of inquiry and of trial are essential for the preparation of the defense."

No tenant should be charged with the absolute duty—much less should his counsel—of forsaking all other business and considerations in order to appear in court in answer to a summary proceeding within two hours, on pain of being ejected from his property and relegated to the often illusory, as herein, privilege of asking leave to defend as matter of favor than of right.

In other instances the courts of New York have not been remiss in recognizing the importance of notice as an essential ingredient of due process. Thus, in *Finn* v. *Chase National Bank,* 176 Misc. 127, 27 N. Y. S. 2d 771, the Appellate Term, First Department, held:

> "Personal service of a summons of the City Court of New York in Illinois, requiring the defendant to appear and answer in New York in six days is invalid as not reasonable and adequate notice, and therefore violative of the due process clause of the Fourteenth Amendment of the United States Constitution."

Similarly, in *Clarke* v. *Carlisle Foundry Co.,* 150 Misc. 710, 270 N. Y. S. 351, it was said:

> "Inadequate opportunity to appear and answer is equivalent to no notice or opportunity at all. ' * * * A

> legislature cannot enact that no notice be given, or make that a notice which is no notice at all. To do that would be a fraud on the Constitution.' Martin v. Central Vermont R. R. Co., 50 Hun 347, 350, 3 N. Y. S. 82, 83."

The principle involved is one that is universally recognized and applied. Unless a statute in itself provides for the giving of notice and an opportunity for hearing before property or the possession thereof can be taken, it violates the constitutional inhibition against taking property without due process of law. *Rassner* v. *Federal Collateral Society*, 299 Mich. 206, 300 N. W. 45. Notice and an opportunity to be heard are essential elements of due process of law. *Voeller* v. *Neilston Warehouse Co.*, 136 Ohio St. 427, 26 N. E. 2d 442. No one may lawfully be deprived of his property without notice and a hearing. *Mud Bay Logging Co.* v. *Dept. of Labor & Industries*, 189 Wash. 285, 64 P. 2d 1054. Notice and a hearing are essential to due process. *Tyson* v. *Tyson*, 219 N. C. 617, 14 S. E. 2d 673. And the notice required by the Constitution must be reasonably calculated to give the defendant actual notice of the proceedings. *Hackner* v. *Guaranty Trust Co.* (C. C. A. 2) 117 F. 2d 95.

The indignation felt by this Court over the manner of accomplishing an ejectment in *Windsor* v. *McVeigh*, 93 U. S. 274, 23 L. Ed. 914, finds an absolute parallel herein. There Mr. Justice Field wrote:

> "Wherever one is assailed in his person or his property, there he may defend, for the liability and the right are inseparable. This is a principle of natural justice, recognized as such by the common intelligence and conscience of all nations. A sentence of a court pronounced against a party without hearing him or giving

him an opportunity to be heard, is not a judicial determination of his rights, and is not entitled to respect in any other tribunal.

"That there must be notice to a party of some kind, actual or constructive, to a valid judgment affecting his rights, is admitted. Until notice is given, the court has no jurisdiction in any case to proceed to judgment, whatever its authority may be, by the law of its organization, over the subject-matter. But notice is only for the purpose of affording the party the opportunity of being heard upon the claim or the charges made; it is a summons to him to appear and speak, if he has anything to say, why the judgment sought should not be rendered. A denial to a party, of the benefit of a notice would be in effect to deny that he is entitled to notice at all, and the sham and deceptive proceeding had better be omitted altogether. It would be like saying to a party: appear, and you shall be heard; and, when he has appeared, saying: your appearance shall not be recognized, and you shall not be heard. In the present case, the district court not only in effect said this, but immediately added a decree of condemnation, reciting that the default of all persons had been duly entered. It is difficult to speak of a decree thus rendered with moderation: it was, in fact, a mere arbitrary edict, clothed in the form of a judicial sentence."

In the light of the doctrine declared by this Court and by others, petitioner feels that the statutes under consideration, permitting the issuance of a final order upon two hours' notice, particularly when viewed in conjunction with the provisions for constructive service or service on persons other than tenants, far transcend any adjudication as to the limits of permissible notice. Situations must frequently

arise where the tenant, as herein, could not possibly be aware of the commencement of the proceeding until after his default has been taken and a final order entered. He may not lawfully be remitted to the supposed discretion of a court through an application to open a default—a right which proved so tenuous herein. However consuming may be the landlord's desire for possession, the tenant may well have lawful and sufficient objections to the granting of that relief, and the streamlined process afforded the landlord by the statute is destructive of any reasonable likelihood that the respective contentions of the parties will be adjudicated in orderly fashion. Petitioner feels that upon full deliberation this Court will hold the offending statutes unconstitutional.

CONCLUSION

For the reasons stated above, the application for a writ of certiorari should be granted.

Respectfully submitted,

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Attorney for Petitioner.